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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ssangyong Construction Company, Ltd.

File: B-225947.3

Date: August 20, 1987

DIGEST

Where the solicitation fails to reference an American Preference Policy (APP) which requires that a 20 percent factor be added to the bids of foreign contractors competing for military construction projects, and the contracting officer advises potential bidders that the APP is not applicable to the procurement, it would be unfair to apply the APP after bid opening to the prejudice of a foreign contractor. Instead, the solicitation should be canceled and the requirement resolicited based on proper and consistent ground rules.

DECISION

Ssangyong Construction Company, Ltd., a company incorporated in the Republic of Korea, protests the proposed award of a contract to Pacific Construction Company, Ltd. (PACCO), a United States contractor, under invitation for bids (IFB) No. F64133-87-B0009, issued by the Department of the Air Force for the renovation of 200 military housing units on Guam. Ssangyong basically contends that the imposition of an American Preference Policy (APP) against Ssangyong violates Ssangyong's rights, and that, in any case, the IFB was defective because it failed to provide notice that an APP would apply to this procurement. Ssangyong contends that if it is not awarded the contract, the solicitation should be canceled and the requirement resolicited.

We find that the APP does apply, but we sustain Ssangyong's protest that a new solicitation should be issued.

Under the APP, incorporated in the fiscal year 1986 and 1987 military construction appropriation acts, contracting agencies must give United States contractors a 20 percent preference in evaluating their bids against those of foreign contractors competing for military construction contracts exceeding $1 million in United States territories and possessions in the Pacific and on Kwajalein. The APP

applicable to the appropriations to be used to fund this procurement was enacted on October 30, 1986, but the IFB, issued on December 9, 1986, did not reference it.

Ssangyong's low bid of $11,500,000 is less than 20 percent below PACCO's second low bid of $11,580,000. The Air Force first intended to award the contract to Ssangyong as the low bidder, but after PACCO protested that under the APP the Air Force should give PACCO's bid a 20 percent preference, the Air Force determined that the APP applied, and that PACCO therefore should receive the contract.

Ssangyong contends that the application of the APP to this procurement violates its right to "national" treatment under the November 28, 1956, Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States. Ssangyong argues that under Articles I and VII of the treaty, Korean companies engaging in business activities in the United States must be accorded equitable and national treatment that is no less favorable than that accorded United States companies. The Air Force responds that since the APP was enacted after the 1956 Treaty, the APP controls because it is the latest expression of the sovereign.

We find no legal merit to Ssangyong's position. Article I of the treaty does promise "equitable" treatment, and Article VII promises "national" treatment regarding business activities. However, Article XVII, provision 2, deals with government contracts specifically, and states that, with respect to the award of United States government contracts, Korea is to be accorded fair and equitable treatment as compared with that accorded to companies of any third country. Korean companies, therefore, only are to be treated the same as are other countries' companies, not the same as United States ones, for the purpose of awarding government contracts.

Application of the APP, as mandated by the funding statute, thus is not inconsistent with the rights accorded Ssangyong by the United States/Korea treaty, since it does not distinguish among foreign contractors; in view of the statutes's mandate, the APP applies to this procurement. We point out here that our reading of the treaty vis-a-vis the appropriation act is consistent with advice we have received from the Department of State in response to the protest. As a general matter, when there is doubt as to the meaning of a treaty provision, State's construction, while

not conclusive,1/ is given great weight. 38 Comp. Gen. 7 (1958); see also 41 Comp. Gen. 70 (1961).

Ssanyong argues that if the APP does apply, the solicitation should be canceled and the requirement resolicited. Ssangyong points out that not only did the invitation fail to mention the APP, but, according to the protester, the contracting officer specifically advised potential bidders at a prebid conference that the APP would not apply. Ssangyong maintains that it was prejudiced by the Air Force's determination, after bid opening, to apply the APP because it would have bid lower or used an American subsidiary in the procurement if it had known the preference would be an evaluation factor.

The contracting officer responds that potential bidders were not advised at the prebid conference that the APP applied, but rather were told that no guidance had been received from headquarters and that notification would be provided by amendment to the IFB if the Air Force were to determine that the APP was applicable. The contracting officer also suggests that foreign bidders were not prejudiced in the competition because it is unlikely that there would have been a material change in the bids, since all bids were close to the government's estimate. The contracting officer notes that if Ssangyong were to reduce its bid to offset the 20 percent preference in favor of United States companies, its bid would be approximately $5 million below the government's estimate and therefore highly questionable.

The record includes a statement by a bidder other than Ssangyong--a United States company--confirming that the contracting officer advised potential bidders at the prebid conference that the APP would not apply. PACCO also states that the contracting officer told it, apparently sometime before bid opening, that the APP would not apply. Moreover, the Air Force's initial post-bid opening determination that Ssangyong was in line for the award indicates that the contracting officer assumed that the APP did not apply to this procurement. In these circumstances, we are constrained to conclude that the competition was conducted with the assumption by all concerned that the APP did not apply.

It is fundamental that once an evaluation scheme is announced, and bids are invited on that basis, an agency is

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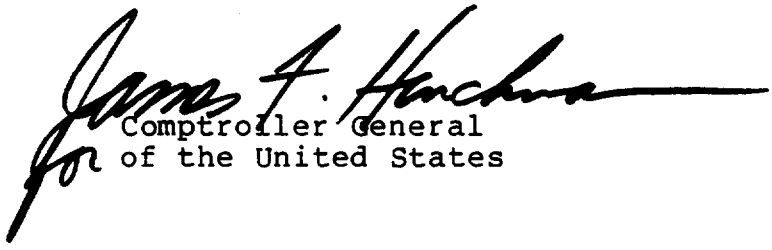
1/ Under Article XXIV, provision 2, of the treaty, disputes between the parties as to interpretation or application not satisfactorily adjusted by diplomacy, are to be submitted to the International Court of Justice, unless the parties agree to settlement by some other means.

not free to evaluate the bids on some other basis. We recognize that the invitation in this case was silent as to the APP. However, because we are persuaded that the Air Force in fact told bidders that the procurement's ground rules did not include application of the preference, we think it unfair for the Air Force to change these ground rules after bids are submitted, and apply the APP to the predjudice of a foreign contractor. As stated above, the protester asserts that it would have bid lower or used an American subsidiary if it had known that the APP applied. Additionally, another bidder states that the failure to identify the project as an APP procurement, and the contracting officer's statement at the prebid conference, materially affected bidding conditions and may have discouraged potential American bidders. We are not willing, in these circumstances, to conclude that there was no prejudice, based only on the Air Force's speculation that bids would not have changed materially had the APP been noted. See Tapex American Corp., B-224206, Jan. 16, 1987, 87-1 C.P.D. ¶ 63, in which we sustained a similar protest where the record included no more than the agency's speculation about the effect of a defective invitation on the competition. (We subsequently reversed the decision, however, because the agency supported its view with substantive evidence. Tapex American Corp.--Reconsideration, B-224206.2, June 24, 1987, 87-1 C.P.D. ¶ 626.) Instead, we think the record in this case suggests the clear possibility that bidders and potential competitors were prejudiced. See R. S. Data Systems, Inc., B-225437, Mar. 11, 1987, 87-1 C.P.D. ¶ 274. Accordingly, the solicitation should be canceled.

By separate letter of today to the Secretary of the Air Force, we are recommending that the Air Force cancel the IFB and issue a solicitation that puts bidders on notice of the APP.

The protest is sustained.



for Comptroller General
of the United States